

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:)

Application of Section 73.606(b),)

Table of Allotments, Television)

Broadcast Stations and Section 73.622(b),)

Table of Allotments, Digital Television)

Broadcast Stations (Buffalo, New York))

MM Docket No. 98-75
RM-9364

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FEDERAL COMMUNICATIONS COMMISSION
SPECIAL AGENT IN CHARGE

TO THE COMMISSION

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

The Coalition for Noncommercial Media ("CNM"), by counsel, respectfully replies to the "Opposition to Application for Review" filed September 7, 1999 by Western New York Public Broadcasting Association ("WNYPBA").^{1/}

^{1/} Four contentions of WNYPBA are too weak to only marginal notice.

First, WNYPBA states that CNM did not provide "documentation" proving that its members are "regular viewers" of the stations. Opposition at 2. No such documentation was provided because none was required. CNM also speculates that CNM's Application for Review must have been "generated by a national group centered in Washington, D.C.", which WNYPBA does not name. This allegation is absolutely not true. It is also somewhat bizarre: WNYPBA's President and General Manager is well aware of CNM's bonafides, having met recently with a number of CNM members.

Second, as substantive support for the merits of its proposal, WNYPBA offers that its own trustees voted for it. Opposition at 9. It would surely be odd for a broadcast applicant to file a document at the FCC which its governing body opposed. If the Commission accepted WNYPBA's standard for determining the merits of an application, it could reduce its staff to one person -- a clerk with a rubber stamp.

Third, WNYPBA seeks credit for an unspecified proposal to air "significant minority-oriented programming and projects" (which it does not describe) and for the race of its CEO. Opposition at 8. These factors are irrelevant to the merits of how many public TV channels the viewers of Buffalo are entitled to enjoy as their legacy.

[n. 1 continued on p. 2]

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At the outset, WNYPBA has failed to show that the Bureau gave CNM's counterproposal a face-to-face comparison with WNYPBA's proposal, as it was required to do. See Opposition at 10-14. It does not matter whether the Bureau misunderstood CNM to have sought noncommercial reservations for all commercial channels actually used for public TV (including Buffalo Channel 17), or whether the Bureau understood CNM to be seeking only the reservation of Buffalo Channel 17. Either way, some or all of CNM's counterproposal was mutually exclusive with WNYPBA's proposal, because approval of one prevented approval of the other.^{2/} Accordingly, the correct test was which proposal was superior -- not whether WNYPBA's proposal was minimally acceptable notwithstanding CNM's policy arguments against it.

1/ [continued from p. 1]

Finally, WNYPBA seems to assume that it could have achieved the result sought in its counterproposal simply by commencing commercial operation on nonreserved Channel 17. Opposition at 6. Fortunately, WNYPBA knows its community better than that, which is why it did not attempt such an unseemly, ham-handed maneuver. Nor would such a scheme have been lawful. Channel 17's renewal application promised noncommercial operation. Had WNYPBA begun operating so dramatically at variance with this fundamental promise, Buffalo public television viewers would have sought revocation of WNYPBA's FCC licenses. Many would also have turned in their WNYPBA memberships and sued to replace WNYPBA's trustees.

2/ CNM is not contending that the mutual exclusivity of its proposal and WNYPBA's proposal required the Commission to undertake a full-blown evidentiary hearing. Cf. Cellular Mobile Systems of Pennsylvania, Inc. v. FCC, 782 F.2d 182, 1898 (D.C. Cir. 1985) (paper hearings sufficient to fulfill the requirements of 5 U.S.C. §556(d) in licensing cases.) The Commission can use any reasonable method to compare the proposals. All CNM contends is that the proposals' mutual exclusivity requires the Commission to afford them equivalent, head-to-head consideration. The Commission cannot presume that either proposal is superior simply because of who filed it or when it was filed. Nor can the Commission treat CNM's counterproposal as though it were merely a petition to deny, with WNYPBA's proposal held only to the bare minimum, noncomparative standards for grantability.

WNYPBA's proposal should be rejected even if it is considered in isolation from CNM's counterproposal. WNYPBA has failed to show that the drastic step of depriving Buffalo's television viewers of one of their only two public TV signals is justified in order to allow WNYPBA to produce programming for national distribution and obtain fast money for digital conversion. See Opposition at 8-9. These may be worthy goals, but WNYPBA has failed to show that there is any critical shortage of nationally syndicated programming for public television,^{3/} or that Channel 17 faces unique difficulties with digital conversion not experienced by the other 99+% of the nation's public TV licensees, who have no stations to sell.

Most important, though, WNYPBA has not shown that it has even begun to exhaust alternative means of achieving its goals. It did not show that it had approached the foundation community to seek grants for national program production or digital conversion. And most critically, it did not show that it had seriously attempted to sell Channel 23 to another public broadcaster.^{4/}

When television was in its infancy, the Commission determined, based on then-applicable market conditions, to reserve two public TV channels in Pittsburgh and one in Buffalo.^{5/} Fortunately, the market spoke loud enough to show that in each of these large, multicultural communities, two public TV stations could be operated

3/ WNYPBA did not elaborate on its specific program production plans or explain how they would benefit its Buffalo viewers. Its plans may be worthy, but we do not know what they are.

4/ Compare Deletion of Noncommercial Reservation of Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania, 11 FCC Rcd 11700 (1996) ("Pittsburgh") (discussed infra).

5/ See Sixth Report and Order in Docket Nos. 8736, et al., 41 FCC 148 (1952).

viably. The public in each community has become accustomed enjoying the diversity of program choices which two public TV signals make possible. The viewers' interests are paramount here,^{6/} and from their standpoint, the preservation of multiple channel public TV in Pittsburgh is impossible to square with the exact opposite result in Buffalo. Try explaining to Buffalo TV viewers that the different channel reservation decisions made for Buffalo and Pittsburgh -- in 1952! -- justify this difference in outcome in 1999.^{7/}

Pittsburgh is the model for the this case. There, the Commission sympathized with the licensee's desire to raise money by selling a station, but noted that the station could be sold to another public TV operator.^{8/} Thus, it was unnecessary for the Commission to reverse its longstanding support for two-channel public broadcasting, and upset the legitimate expectations of Pittsburgh public TV viewers, by taking the unprecedented step of approving a channel allocation request admittedly made only to allow the sale of a noncommercial station to a commercial company.^{9/} WNYPBA has not even taken the minimal step, taken by

^{6/} Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

^{7/} Indeed, had it been able to foresee the future success of two-channel public TV in Buffalo, the Commission surely would have reserved two public TV channels in Buffalo in the first place. Then this case would have been pure Pittsburgh redux.

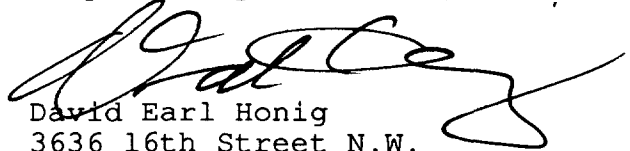
^{8/} It actually was, through a backup contract.

^{9/} WNYPBA cites only one case in which the Commission dereserved a public TV channel to allow a sale to a commercial entity. See Opposition at 5, citing the assignment of station KLTC-TV, Channel 43, Oklahoma City, OK, File No. BALCT-980327IA (filed March 27, 1998 and granted July 8, 1998).

the Pittsburgh licensee, of trying to sell Channel 23 to another noncommercial entity.

As shown above, the Commission should reject WNYPBA's proposal and grant CNM's counterproposal. Alternatively, it should return WNYPBA's counterproposal and instruct WNYPBA to take reasonable steps to sell Channel 23 to another noncommercial entity.

Respectfully submitted,



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October 6, 1999

9/ [continued from p. 4] Having been granted by delegated authority without opinion, this decision is not binding precedent; indeed, it appears to fly in the face of Commission policy. See Amendments to the Television Table of Assignments to Change Noncommercial Education Reservation, 59 RR2d 1445, 1462-1464a (1986), recon. denied, 3 FCC Rcd 2517 (1988) (stating that proponents of intraband channel exchanges must demonstrate that the audience will receive substantially comparable service, and expressing the unlikelihood that the Commission would eliminate a noncommercial reservation through a channel exchange procedure); see also Pittsburgh at 11708 ¶18 (citing Amendment of Section 73.606, Table of Assignments, Television Broadcast Stations (Ogden, Utah), 26 FCC2d 142 (1970), recon. denied, 28 FCC2d 705 (1971)) (which held that the Commission's policy has been to deny "requests to delete reserved channels, citing as a principal reason for doing so the need to preserve the future availability of the channels.")

In any event, the Oklahoma City assignment is distinguishable from the instant case. Before the sale of KLTC-TV, the Oklahoma City DMA (Market #45) had three public TV stations, two of them on reserved channels. It still has two such stations -- both VHF's (KETA-TV, Channel 13, Oklahoma City, and KWET-TV, Channel 12, Cheyenne). The Buffalo DMA (Market #42) only has two public TV stations, only one of which is on a reserved channel. See 47 CFR §73.606(b) (TV Table of Allotments) and the Broadcasting and Cable Yearbook 1999, Nielsen DMA Market Atlas, pp. B-164 and B-209. Thus, the Oklahoma City sale at least retained some public TV channel choice for the viewers. The sale of Buffalo Channel 23 would not retain any viewer choice.

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 6th day of October, 1999 caused the foregoing "Reply to Opposition to Application for Review" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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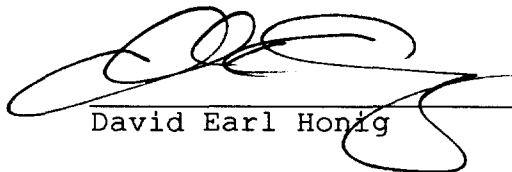
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